W(h)ither Sovereignty?

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Harbingers of the demise of sovereignty are not new. At least since Karl Marx prophesized the withering away of the state, the heralding of the end of sovereignty has been an almost recurrent theme in political theory. In recent times, however, these prophecies have become increasingly insistent and have, perhaps for the first time, emanated predominately from the field of public law. In the European context, the debate about whether and to what extent EU membership compromises state sovereignty has been a central preoccupation of scholars of European integration for a generation, a debate which has intensified in the aftermath of the Euro crisis. In the U.K., a host of developments, both European and domestic, continue to fuel the discussion as to whether Parliament is indeed still sovereign, a notable recent catalyst being the ECtHR's role in clipping Parliament's wings over issues such as immigration and prisoner voting.

The concept of sovereignty, including its institutional expression in parliament in the UK constitution, provides part of the deep grammar of public law. Thus for public lawyers, the question of the fate of sovereignty is of central concern to our discipline. However, if it is a commonplace that sovereignty is somehow affected by recent political developments, what is less clear, is how. Logically speaking there are three possible answers to this question: sovereignty hasn't changed, is undergoing a slow and steady demise or is evolving and adapting to new realities. Holders of the no-change position have disputed that sovereignty has changed at all. They rely on Schmittian scenarios of unilateral Member state withdrawal from the EU, or repeal of the various 'constitutional statutes' of which a substantial part of the UK constitution is apparently made, if for no other reason than to allow Parliament to flex its sovereign muscle, to argue their case. Others dispute the continuing relevance of sovereignty to the contemporary world, seeing demise as the only possibility. Given the supposedly categorical nature of the concept – either you have it or your don't – then the notion of sovereignty evolving rather than simply being surrendered doesn't make sense, and so we must get used to our new post-sovereign realities, recalibrating our practices, including public law, accordingly.

An emerging more nuanced view is that sovereignty is indeed evolving but not to such an extent that it is no longer relevant. This 'late sovereignty' position holds that the concept still retains its purchase on law and politics, both domestic and supranational, but that its has evolved from the Westphalian paradigm of hermetically sealed sovereign states to incorporate transnational actors such as the EU and ECtHR and their influence on domestic public law. This evolution denotes a change in the nature of sovereignty claims from categorical to more relative claims of authority such that simultaneous sovereignty claims, both national and supranational, are not incommensurable.

This more nuanced account which views sovereignty in phases from early, high to late forms, implicitly relies on a conception of sovereignty which is flexible and context-specific, rather than immutable and rigid meaning the same thing in all times and places.

As the grammar of public law, the concept of sovereignty entails a series of rules governing the idea of ultimate authority in legal and political practice providing the ground rules of 'sovereignty games'. The constitutive rules of sovereignty games constitute the actors participating in the game, that is those agents which makes ultimate authority claims, as well as providing the primary indicator that a particular 'game' is being played – that a *sovereignty* game and not some other sort of game, such as post-sovereignty, is being played. The regulative rules provide standards against which to measure how well the game is played and as such provide criterion for what constitutes a 'good' or legitimate claim to ultimate authority. It is the evolution of this grammar, the constitutive and

regulative rules of sovereignty games, which mark the passage from high to late sovereignty.

The rules of sovereignty games played during the high sovereignty era, then, were played primarily by sovereign states, making claims to ultimate authority over a territory and people (the constitutive rules of high sovereignty), justified according to notions of constituent power, popular sovereignty, divine right or even mere convention (the regulative rules of high sovereignty). In late sovereignty games, the grammar has evolved such that the constitutive rules of late sovereignty games relate not, or not exclusively, to territory and people, but to functional domains such as trade, the environment or human rights. Furthermore the constitutive rules of late sovereignty games imply that the actors making such claims to ultimate authority no longer fit the mould of the sovereign state. Thus, the EU makes claims to ultimate authority over certain sectorally defined functions without being, or claiming to be, a sovereign state.

The regulative rules of late sovereignty games, that is, the criteria for what constitutes a 'good' sovereignty claim, have also evolved. First of all, the repertoire of reasons that count as 'good' or legitimate claims to ultimate authority has expanded beyond those of high sovereignty. For example, the justification of ultimate authority claims by the EU over specific functional domains does not rely on constituent power or popular sovereignty, the reason of choice in the high sovereignty era, but rather on grounds of functional necessity. Thus, the paradigmatic EU late sovereignty claim, the claim to the primacy of EU law by the ECJ, was justified, not according to the will of a European people(s) but with reference to the need to achieve the objectives and aims of the EU Treaties. In this way, the reasons which justify and legitimate late sovereignty claims have expanded beyond popular sovereignty to include what Fritz Scharpf has called 'output legitimacy'.

Moreover, conventional justifications of ultimate authority in particular contexts have also shifted in the era of late sovereignty. Whereas the vestiges of high sovereignty are still traceable in the sovereignty claims of EU Member states, they are arguably not unaffected by the transition from high to late sovereignty in Europe. This is because the conventional justification for sovereignty in a specific national context in the high sovereignty period no longer provides the justification for national sovereignty in late sovereignty. Two examples of recent EU Member state sovereignty claims serve to illustrate this point; the German Federal Constitutional Courts (GFCC) *Lisbon* decision and the UK Parliament's European Union Act 2011, both of which have received attention in previous posts on this blog.

In June 2009, the GFCC handed down its decision on a challenge to German ratification of the Lisbon Treaty of 2008 finding that such ratification would not *per se* violate the German constitution. Significantly, the Court found that, notwithstanding the constitution's 'openess' to European integration, that there were absolute limits on the level of integration possible under the German constitution. The rationale for this conclusion was based on a strong assertion of German sovereignty, references to which were littered throughout the judgment. In particular the court justified German sovereignty according to the principles of constituent power, popular sovereignty and the self-determination of the German people which created a particularly robust constitutional identity reflected in the provisions of the German constitution. This identity set absolute limits to the level of integration possible under the constitution. Nothing, not even the constitutions 'openess' to European integration, could undermine this identity.

Similarly, the European Union Act of 2011, can be read to entail sovereignty claims on behalf of the UK vis-à-vis European integration. In particular two features stand out in this regard, the s. 18 'sovereignty clause' which states that EU law falls to be recognised and available in law in the United Kingdom only by virtue of Acts of Parliament as well as the various 'referendum locks' triggering a referendum *inter alia* whenever further powers are transferred to Brussels. In terms of justifications of these claims to UK sovereignty, the sovereignty clause has been justified according to nebulous references to the common law's recognition of Parliamentary sovereignty, whereas the referendum locks are implicitly invoking the will of the people and theories of popular sovereignty and constituent power.

On an initial reading, these assertions of national sovereignty by Germany and the U.K. are unremarkable. They seem to be rather typical assertions of national state sovereignty according to the classic tropes of high sovereignty

games. A closer reading, however, shows that given the context within which they were made, are better understood as forms of late sovereignty claims prompted by the process of European integration.

Firstly, with respect to the GFCC's Lisbon decision, the assertion of German sovereignty based on the people and a German constituent power marks a shift from the conventional justifications of German state sovereignty in the post-war era. In the reconstruction of post-war Germany, and particularly in the drafting of the new constitution, the previously unhappy experiences with popular sovereignty based on a constituent power were suppressed in favour of a strong assertion of the rule of law and the supremacy of the constitution over the political process, which was instrumentalized by a powerful Constitutional Court which frequently undid the will of Parliament. As Christoph Mollers has argued, this was copper-fastened in the basic law itself through an absolute prohibition on the holding of referendums or plebiscites. It was also explicitly recognized by the GFCC itself in the Lisbon decision where it found that:

'The [post-war constitution] … breaks with all forms of political Machiavellianism and with a rigid concept of sovereignty which until the beginning of the 20th century regarded the right to wage war – even a war of aggression – as a right due to sovereign state as a matter of course' (para. 199).

Thus, the post-war German constitutional landscape was marked by a 'constitutional patriotism' crystallizing around the constitution and the rule of law rather than strong assertions of popular sovereignty or constituent power. Against this background the justificatory claims of German sovereignty in the Lisbon decision, mark a shift from the constitutional patriotism which has underpinned and justified German sovereignty in the post-war era in the light of the integration experience to an assertion of constituent power and popular sovereignty in the late sovereign period. Similarly in the UK, the sovereignty clause and the referendum locks in the European Union Act 2011 mark a shift in conventional justifications of UK sovereignty. Conventionally, UK Parliamentary sovereignty was, as Wade argued, justified according to its social 'facticity' rather than by references to the common law as the Ministerial statements surrounding the sovereignty clause seem to suggest (and the Courts have recently supported with gusto). More strikingly, perhaps, however is the novel justification of UK sovereignty, not based on Parliamentary sovereignty, but by reference to popular sovereignty based on a constituent power as evidenced in the referendum locks. As Martin Loughlin has argued, the idea of a constituent power is almost completely alien to modern British constitutional practice. Thus, this shift in the justifications of national sovereignty in Germany and the UK in the face of European integration qualify these claims as 'late' rather than 'high' sovereignty claims.

Sovereignty is still prevalent in our political vocabulary and is still providing the grammar of the practices of public law. However, if we scrape beneath the surface, we can see how the grammar of this constitutive concept is itself subtly evolving. This evolution is essential for understanding constitutional change in the contemporary world.

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